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CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

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Decided: January 25, 2007

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Re: *EDIX Media Group, Inc. v. Parham Mahani*
Civil Action No. 2186-N

Dear Counsel:

I have carefully considered the briefs and documentation submitted by both parties with regard to fees, costs and expenses. Defendant asserts that a fee award of almost $100,000 represents an expenditure of resources that is excessive relative to the value of the case and plaintiff's limited success on the merits. I find defendant's arguments to be without merit. Plaintiff's counsel has not asked for an exorbitant hourly rate and, to the extent that this case consumed much of Mr. Holly's time, fault lies squarely with Mahani.

I. FACTS

Plaintiff seeks to recover litigation costs pursuant to a provision of the Non-Compete and Confidentiality Agreement executed between the parties, which provides that:

> Covenantor [Mahani] expressly agrees to indemnify and hold harmless Corporation [EDIX], its officers, directors, agents and other employees from any and all loss, damage, expense or cost (including attorneys fees and

> disbursements attendant thereto) arising out of or in any way connected with the enforcement of this Agreement, the breach of any duty, obligation, representation, warranty and/or covenant herein contained . . . .

In a ruling on December 12, 2006, this Court found that Mahani violated the Agreement and awarded plaintiff compensatory, exemplary and nominal damages in the amount of $16,500.06. Further, the Court awarded plaintiff attorney's fees, costs of litigation, and other costs incurred in pursuing the lawsuit.[1]

Plaintiff asserts that its attorney's fees and costs amount to $99,934.50. Defendant asks this Court to reduce this award to reflect the fact that plaintiff was only partially successful in prosecuting its case, and that plaintiff's counsel dedicated an excessive number of attorney hours to the litigation.

II. ANALYSIS

As an initial matter, agreements allocating the cost of future litigation between parties to an employment contract are not *per se* void as a matter of public policy.[2] Although fee-shifting agreements in employment contracts may be scrutinized more carefully where the Court is concerned about a disparity in bargaining power between the parties,[3] public policy implications weigh much less heavily when the fee-shifting provision is applied to a defendant's knowing, intentional, and (in this case) wrongful conduct performed after the termination of an employment relationship.[4] Nothing prevents the fee-shifting provision of the Agreement from being enforced as written in this case.

The Agreement does not explicitly require that fees be awarded in proportion to plaintiff's success on the merits. Defendant asks the Court to add such a clause by implication, based either upon cases involving the statutory award of "reasonable" attorney's fees or the requirements of the Delaware Lawyers' Rules of Professional Conduct. First, the case law cited by defendant is irrelevant. Cases like *Fasciana v. Electronic Data Systems Corp.*[5] or *Hensley v. Eckerhart*[6] involve fees shifted between litigating parties by statute. Such fees are generally required

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[1] 2006 Del. Ch. LEXIS 207 (Del. Ch. Dec. 12, 2006).
[2] *See All Pro Maids, Inc. v. Layton*, 2004 Del. Ch. LEXIS 116, at *48 (Del. Ch. Aug. 9, 2004).
[3] *See Research and Trading Corp. v. Pfuhl*, 1992 Del. Ch. LEXIS 234, at *41-42 (Del. Ch. Nov. 19, 1992).
[4] *All Pro Maids*, 2004 Del. Ch. LEXIS 116, at *48.
[5] 829 A.2d 178 (Del. Ch. 2003).
[6] 461 U.S. 424 (1983).

to be reasonable, and are often available as an incentive to attorneys to encourage the prosecution of cases in the public interest. When a court considers a plaintiff's success on the merits in determining a reasonable fee award, it must balance the incentive for private attorneys to enforce legislative goals with the cost of potentially frivolous litigation. These agency concerns are not present in a case between two individuals. A private party possessed of contractual rights may pursue those rights vigorously even if, as here, they are ultimately only partially successful. If the contract includes reimbursement of expenses necessary to enforce those rights, then such expenses may be awarded.

Defendant's reliance on Rule 1.5 of the Delaware Lawyers' Rules of Professional Conduct is only slightly less misplaced. The amount involved in litigation and results obtained are only two of many factors to be considered in determining the reasonableness of an attorney's fee.[7] The time and labor required to carry a case to trial also carries considerable weight.[8] Defendant will not be heard to complain that the time spent preparing for litigation was excessive when he may be blamed for so much of the cost and delay.

Defendant is particularly offended at the 169.9 hours plaintiff dedicated to trial preparation. Left unstated, however, is the fact that plaintiff's counsel had to ready himself for trial twice. Between July 19 and August 14, 2006, Mr. Holly spent 94.2 hours organizing trial exhibits, preparing depositions, drafting questions for witnesses, and otherwise getting ready for trial. Shortly thereafter, defendant asked the Court to postpone the trial due to the resignation of defendant's initial counsel. At that time, the Court warned Mahani that "[t]o the extent this delay of the trial causes additional harm to EDIX . . . [Mahani] risks imposition of a significant financial judgment against him."[9] Mr. Holly spent an additional 75.7 hours between September 19 and October 11, 2006. These hours are rightfully the responsibility of defendant.

With ample opportunity to minimize the costs of litigation, defendant at every step chose to draw out the conflict. Defendant now downplays the difficulty faced by plaintiff at trial, suggesting that "[F]rom the outset of the case, EDIX had obtained 'smoking gun' evidence that Mahani was the person responsible for sending at least one, if not all, of the e-mails [that breached the Agreement]."[10] Yet it was not enough to have this evidence in hand. Proving that Mahani sent the

[7] Del. Lawyers' Rules of Prof'l Conduct R. 1.5(a)(4).
[8] Del. Lawyers' Rules of Prof'l Conduct R. 1.5(a)(1).
[9] Letter of the Court to Counsel, Aug. 22, 2006.
[10] Def.'s Post-Trial Mem. at 8.

emails required plaintiff's counsel to depose police officers, obtain records from third parties, and then present this evidence at trial. Because defendant required plaintiff to establish, via the production of testimony or documentary evidence, every key issue of fact in the case, he cannot complain of the fees shifted upon him.

In essence, defendant's conduct during the trial process represented a gamble in which defendant balanced the possibility of reducing (or even avoiding) an eventual judgment on the merits with the chance that he would have to pay for a more expensive trial. If the final damages seem disproportionately small in comparison to attorney's fees and costs, it is only because he doubled-down on that bet too many times.

Parties shall submit a form of order to the Court implementing this decision.

Very truly yours,

William B. Chandler III

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